Citation: *JP v Canada Employment Insurance Commission*, 2023 SST 1291

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (478687) dated May 27, 2022 (issued by Service Canada)

Tribunal member:	John Noonan
Type of hearing:	In person
Hearing date:	March 7, 2023
Hearing participants:	Appellant
Decision date:	April 5, 2023
File number:	GE-22-2076

Decision

[1] The appeal is dismissed.

[2] The Tribunal disagrees with the Appellant.

[3] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits on this claim.

Overview

[4] A claim for employment insurance benefits was established by the Appellant, J. P. effective December 12, 2021. This claim was, on April 6, 2022 denied as the Canada Employment Insurance Commission (Commission) determined that the Appellant was disqualified from receiving benefits because he had lost his employment due to his own misconduct on December 13, 2021. The Appellant sought and was granted a reconsideration of this decision resulting in the Commission maintaining its original decision. (GD3 – 81). He then appealed to the Social Security Tribunal. The Tribunal must decide if the Appellant committed the act in question and, if so, did his actions constitute misconduct. The results will determine eligibility for benefits under the Employment Insurance Act (Act).

[5] The Appellant's employer says that he was let go because he went against its vaccination policy: he didn't get vaccinated.

[6] Even though the Appellant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct.

[7] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost his job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Issue

[8] Did the Appellant lose his job because of misconduct?

Analysis

[9] The relevant legislative provisions are reproduced at GD4.

[10] The Act does not define "misconduct". The test for misconduct is whether the act complained of was wilful, or at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the effects his or her actions would have on job performance. (**Tucker A-381-85)**

[11] Tribunals have to focus on the conduct of the claimant, **not the employer.** The question is not whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in losing their employment **(McNamara 2007 FCA 107; Fleming 2006 FCA 16).**

[12] The employer and the Commission must show that claimant lost his/her employment due to misconduct, the decision to be made on the balance of probabilities **LARIVEE A-473-06, FALARDEAU A-396- 85.**

[13] There must be a causal relationship between the misconduct of which a claimant is accused and the loss of their employment. The misconduct must cause the loss of employment, and must be an operative cause. In addition to the causal relationship, the misconduct must be committed by the claimant while employed by the employer, and must constitute a breach of a duty that is express or implied in the contract of employment **(Cartier 2001 FCA 274; Smith A-875-96; Brissette A-1342-92; Nolet A-517- 91).**

[14] The law says that you can’t get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.

[15] To answer the question of whether the Appellant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Did the Appellant lose his job because of misconduct?

[16] Yes.

[17] The Appellant was was on a leave of absense from and then lost his job. The Appellant's employer said he was placed on a leave of absence and then let go because he didn't comply with their policy to be fully vaccinated or have an exemption approved.

[18] The Appellant doesn't dispute that this happened but he says he had received one dose of the Pfizer vaccine and due to a reaction he did not take the second dose. He did not have a medical exemption and advised his doctor said he should take it. The Appellant was aware that being fully vaccinated was a requirement of his job. He argues this is illegal and his employer wrongfully dismissed him.

[19] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost his job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

[20] I find the Appellant did breach the employer's vaccination policy which led to his dismissal.

If so, did he do so wilfully to the point he could reasonably expect to be dismissed from his employment for his actions?

[21] Yes.

[22] Tribunals have to focus on the conduct of the claimant, not the employer. The question is not whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant

was guilty of misconduct and whether this misconduct resulted in losing their employment (**McNamara 2007 FCA 107; Fleming 2006 FCA 16**).

[23] The proof of a mental element is necessary. The claimant must have a deliberate behaviour or so reckless as to approach wilfulness (**McKay-Eden A-402-96; Jewell A-236- 94; Brissette A-1342-92; Tucker A-381-85; Bedell A-1716-83)**

[24] A Tribunal must have the relevant facts before they can conclude misconduct and sufficiently detailed evidence for it to be able, first, to know how the claimant behaved, and second, to decide whether such behaviour was reprehensible (**Meunier A-130-96; Joseph A-636-85).**

[25] The word "misconduct" is not defined as such in the case law. It is largely a question of circumstances (**Gauthier** A-6-98; **Bedell** A-1716-83).

[26] All the evidence must be analysed before concluding of misconduct (**Ryan** 2005 FCA 320).

[27] The Appellant was aware of the employer's policy and the consequences should he not be vaccinated.

[28] He chose not to follow the vaccine mandate of the employer asserting he has a medical condition that put him at risk of adverse events from the COVID-19 vaccine but that his condition is not recognized for a vaccine medical exemption. The employer then exercised its right to dismiss the Appellant.

[29] I find the reason for the dismissal is was his refusal to become fully vaccinated as per the employer's policy as communicated to the Appellant..

[30] The Appellant at his hearing, presented very detailed testimony regarding his medical condition for which he was not granted an exemption to the mandated vaccine policy.

[31] He testified that he is and was not "anti vax" as he had received a single dose but chose not to have the second as mandated by his employer.

[32] His concerns, as per his testimony and submissions went un answered by all parties to whom he expressed them.

[33] In the Appellant's request for reconsideration of the Commission's decision to disentitle him from benefits he argued the Commission did not take into consideration the documents he had submitted, his medical history was not considered, there was no clarification on fraudulent employer records, there was no clarification from the Commission on the rationale for misconduct, and there was no communication with his manager regarding his employment (GD3-54 -55).

[34] The concept of Misconduct under the EI Act was discussed at great length with the Appellant and he fully understood that the Tribunal was restricted to making a decision on this only. To make any decision regarding any other issue would be an error in law.

[35] At his hearing and in post hearing submissions, the Appellant has argued I should follow **AL v. CEIC**, a decision made by another Tribunal member.

[36] In AL v. CEIC the claimant was employed by a hospital when her employer introduced a policy requiring all employees to be vaccinated for COVID-19. The Tribunal member allowed AL's appeal based on the member's interpretation of the collective agreement provisions to determine there had been no misconduct and a determination that AL had a "right to bodily integrity."

[37] I don't have to follow other decisions of our Tribunal. I can rely on them to guide me where I find them persuasive and helpful.

[38] I am not going to follow AL v CEIC because the findings and reasoning relied upon by the member do not follow the Federal Court's rules I am required to apply when deciding whether a claimant was suspended from or has lost their employment due to their own misconduct. If I were to follow the reasoning in *AL v CEIC*, by examining whether the employer's policy complied with the collective agreement or was mandated by legislation, I would be committing an error of law because my focus would be on the

employer's actions – something which the courts have been very clear that I am not allowed to do. (I will note that this decision is now under appeal at the Appeal Division.)

[39] There is a case from the Federal Court of Appeal (FCA) called **Canada (Attorney General) v. McNamara.** Mr. McNamara, dismissed from his job under his employer's drug testing policy, argued he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[40] In response to these arguments, the FCA stated it has consistently said the question in misconduct cases is "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the EI Act." The Court went on to note the focus when interpreting and applying the EI Act is "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits.

[41] A more recent decision is **Paradis v. Canada (Attorney General).** Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. He argued he was wrongfully dismissed, the test results showed he was not impaired at work, and he said the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Federal Court relied on the McNamara case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the EI Act.

[42] Another similar case from the FCA is **Mishibinijima v. Canada (Attorney General**). Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued his employer was obligated to provide an accommodation because alcohol dependence has been recognized as a disability. The Court again said the focus is on what the employee did or did not do, and the fact the employer did not accommodate its employee is not a relevant consideration.

[43] These cases are not about COVID-19 vaccination policies; however, the principles in these cases are still relevant.

[44] There is a very recent Federal Court decision, **Cecchetto v Attorney General of Canada, 2023 FC 102, (Cecchetto)**, which does relate to an employer's COVID-19 vaccination policy. Mr. Cecchetto, the Applicant, argued his questions about the safety and efficacy of the COVID-19 vaccines and antigen tests were never satisfactorily answered by the Tribunal's General Division and Appeal Division. He also said that no decision-maker had addressed how a person could be forced to take an untested medication or conduct testing when it violates fundamental bodily integrity and amounts to discrimination based on personal medical choices.

[45] In dismissing the case, the Federal Court wrote:

While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen testing … The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.

The Federal Court also wrote: The [Social Security Tribunal's General Division, and the Appeal Division, have an important but narrow and specific role to play in the legal system. In this case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."

[46] Case law makes it clear my role is not to look at the employer's conduct or policies and determine whether they were right in placing the Claimant on an unpaid leave of absence (suspension), failed to accommodate him, if the vaccination policy was in conflict with other employer policies or violated the Appellant's Collective Bargaining Agreement or offer of employment. Instead, I have to focus on what the Appellant did or did not do and whether that amounts to misconduct under the EI Act.

[47] An employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the Appellant's employer implemented its COVID-19 vaccination policy and it was a requirement for all of its employees, this policy became an express condition of the Appellant's employment. Misconduct Covid Related Policy is universal for all employees. It must take into account that we are / were in a global pandemic which governments and employers attempted to mitigate. There is no requirement to take vaccine but refusal has consequences.

[48] While not relevant to the case at hand, misconduct under the EI Act, this information could be used in another forum which is tasked to decide whether or not the Appellant's human rights were violated (Provincial Human Rights Tribunal) or if any labour issues exist under Provincial or Federal Labour Boards.

[49] The Employment Insurance Act (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's dismissal is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[50] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional. Misconduct also includes conduct that is so reckless that it is almost wilful. The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.

[51] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.

[52] The law doesn't say I have to consider how the employer behaved. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.

[53] I have to focus on the Act only. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide. I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[54] The Commission has to prove that the Appellant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct.

[55] The Appellant does not deny he lost his employment due to the employer's vaccine mandate but denies his actions constitute misconduct.

[56] I find the Appellant does meet the mental element of wilfullness inherent in a finding of misconduct. His submissions show clearly that he was aware of the consequences of not getting vaccinated by the employer's deadline but chose to not be vaccinated anyway.

[57] As a result, I find the Appellant made the conscious, deliberate and wilful choice to not comply with the employer's policy when he knew that by doing so there was a real possibility he could be suspended (placed on an unpaid leave of absence) and not be able to carry out the duties owed to his employer. Accordingly, I find the Commission has proven the Appellant was suspended due to his own misconduct within the meaning of the EI Act and the case law described above.

[58] The employer and the Commission have shown that the Claimant lost his employment due to misconduct, the decision being made on the balance of probabilities **LARIVEE A-473-06, FALARDEAU A-396- 85**.

[59] Therefore I find that it would be probable to conclude misconduct on the part of the Claimant. There should be a disqualification.

Conclusion

[60] The Tribunal ”Must conduct an assessment of the facts and not simply adopt the conclusion of the employer on misconduct. An objective assessment is needed sufficient to say that misconduct was in fact the cause of the loss of employment” (**Meunier A-130-96**).

[61] In having done so, the Member finds that, having given due consideration to all of the circumstances, the Appellant’s actions in this case were deliberate and willful to the point where he knew they would / could lead to his dismissal therefore they do amount to misconduct under the Act therefore the appeal is dismissed..

[62] The Appellant has not succeeded with his burden to demonstrate that his actions in this case do not meet the threshold where they could be considered wlful to the point where he would / could be expected to be dismissed. Therefore he is not entitled to receive EI benefits on this claim.

John Noonan

Member, General Division – Employment Insurance Section